MISCELLANY.

DEATH OF JOEL PRENTISS BISHOP.—Joel Prentiss Bishop, LL. D., the well-known author of legal text books, died on Monday, November 4, at his residence, 51 Sacramento street, Cambridge. Mr. Bishop was born March 10, 1814, in Volney, Oswego county, N. Y., in a small log house. He attended the Whitestone Seminary and Oneida Institute and the Stockbridge Academy, and was a member of the alumni association of the first named institution.

Mr. Bishop later on drifted to Boston, and in the fall of 1842 entered the law office of Henry B. Stanton and John A. Bolles as a student. He made rapid progress in his study, and on April 9, 1844, he was admitted to the Suffolk bar.

The first edition of his "Marriage and Divorce" was published in 1852, just ten years after he entered a law office as a student. The book was received with unusual favor by the profession. He finally decided upon making what he afterwards considered to be the great sacrifice of his life by relinquishing a lucrative practice and thenceforth devoting himself to the drudgery of legal authorship. He believed that by pursuing this course he could be of genuine service to the profession and that he could supply a need in legal literature by expounding some of those important branches of the law which had not hitherto been adequately treated by any author.

The knowledge and appreciation of his labors as a writer of jurisprudence are not confined within the boundaries of the American continent. This is shown by the honorary degree conferred upon him by the University of Berne, Switzerland, at the celebration of the fiftieth anniversary of the founding of the university, in express recognition of the "great services" rendered by his legal works to his country "and to the science of the law."

The books written and published by Mr. Bishop, with their latest editions are: Bishop on *Marriage, Divorce and Separation*, 2 Vols., 1891; *New Criminal Law*, 2 Vols., 1892; *New Criminal Procedure*, 2 Vols., 1895, 1896; *Statutory Crimes*, 1 Vol., 1901; *Contracts*, 1 Vol., 1887; *Directions and Forms*, 1885 (the new edition will be ready in about three weeks); *Non-Contract Law*, 1 Vol., 1889; *Law of Married Women*, 2 Vols., 1871 to 1875; *First Book of the Law*, 1868; *Written Laws*, 1 Vol., 1882.

Most of these works are published by T. H. Flood & Co., of Chicago, except the First Book of the Law, Law of Married Women, and the Written Laws.—*National Corporation Reporter.*

RATIFICATION BY AN UNDISCLOSED PRINCIPAL.—Roberts, a broker, was authorized by the defendant to buy wheat at 45s. 3d. Such purchase being impossible, he bought from the plaintiff at 45s. 6d., hoping that the defendant would take over the contract, and intending it to be for his benefit. The defendant approved Roberts' action, and took over the contract, but later refused to perform. On these facts the House of Lords has decided that the defendant acquired no right and incurred no liabilities on the contract by his attempted ratification, since Roberts did not *profess* to be acting for any other than himself. *Keighley, Maxted & Co.* v. *Durant* (1901) A. C. 240.

The decision is put on these grounds: (1) that the question has already been settled by the authorities; (2) that even were this not so, when a contract has once been closed, the parties thereto are fixed as unalterably as any other of its terms; (3) that to discover and prove what the intention of the agent was is an impossibility; and (4) that to permit such a ratification would be to add an anomaly to the already anomalous doctrine of the undisclosed principal.

The counsel for the plaintiff "boldly" asserted that the opinions upon the point are mere *dicta*, and that the case has never been decided. Though the court thought otherwise, the cases cited do not support its holding. In not one of them has the point been raised; in these cases the agent has either openly professed to act for his principal, *Ancona* v. *Marks*, 7 H. & N. 685 (1862); *Robbett* v. *Pinnett*, 1 Ex. 368 (1876), or, he has not intended so to act, and has therefore not professed so to act. *Saunderson* v. *Griffith*, 5 B. & C. 909 (1826); *Vere* v. *Ashby* 10 B. &. C. 288 (1829); *Wilson* v. *Tumman*, 6 M. &. G. 236 (1843); *Falke* v. *Ins. Co.*, L. R. 34 Ch. Div. 234 (1886). It is true that in all these cases the language used is that as the agent *professed* to act, or did not *profess* to act on behalf of another, that other might or might not ratify the act. As applied to the facts presented there for decision, the language is suitable; but it cannot be taken as decisive of the point here involved. Had this case been in the minds of the judges there speaking it is conceivable that their language would have been different. In *Bird* v. *Brown*, 4 Ex. 786 (1851), there is a *dictum* directly on the point *contra* to the principal case, and though the *dictum* is omitted in another report of the case, 19 L. J. (N. S.), 154, it is more probably an omission in the latter, than an addition in the former case. Finally, the case of *Soames* v. *Spencer*, 1 D. & R. 32 (1822), is dismissed with the short statement that it does not appear what was the form of the contract sued on. But the decision was that, where one of two co-tenants of land contracts to sell the whole land as his own, intending to act for his co-owner, the co-owner can ratify the contract. And in *Foster* v. *Bates*, 12 M. & W. 226 (1843), the court says that wherever one *means* to act for another, a subsequent ratification is equivalent to a prior command. *In re Tiedermann* v. *Ledermann* (1899), 2 Q. B. 66, holds that a contract made by an agent professing to act for another, but intending in his own mind to act for himself, can be ratified. The case is right, for a man could not be allowed to contradict his expressed intention.

Though, as a general rule, a contract once made is closed, and the terms thereof cannot be changed, yet there is a large class of cases in the law of agency, in which on equitable grounds a new party is introduced, both to sue and to be sued. If this be true where there is a prior authority, it should be true where there is a ratification, for a ratification is the equivalent of a prior authority. Bracton de Legibus, f. 171 b; *Dean etc. of Exeter* v. *Serie ae Lanlarazon*, Y. B. 30 Ed. I, 126, 129. So logically is this doctrine applied that it has been held that the ratification of an act, involves the ratification of torts committed by the agent in its performance. *Dempsey* v. *Chambers*, 154 Mass. 330 (1891). In the case under discussion, therefore, the defendant should have been treated as an undisclosed principal. If it be argued that the third party did not know that he was contracting with any other than the agent, it should be remembered that he would not have known this fact, had there been a prior authority. In both cases the agent secretly intends to benefit another. If in the one case the third party

suffers no harm, and equity requires that the undisclosed principal be liable, so does it equally in the other, for, as regards the third party, the cases are identical. Likewise, as between the principal and agent the case is unchanged, whether the agent *profess* to act for the principal or no. In both cases he does act for the principal, and in both cases the principal assents to the act.

If the court decides the case on the difficulty of proving what was the intention of the agent, it grounds its decision arbitrarily on its conception of convenience, and not on the principles of law involved in the case. It is to be noted, moreover, in this connection, that the state of a man's mind in cases of conditional contracts where performance is to be to the defendant's satisfaction, is examined and determined. *Brown* v. *Foster*, 113 Mass. 136 (1873); *Exhaust Ventilator Co.* v. *C. M. & St. P. R. Co.*, 66 Wis. 218 (1886).

Finally, though it be true that the doctrine of the undisclosed principal is anomalous from the point of view of contract law, yet it is as firmly settled in the law of agency as that of either the named or unnamed principal; that is to say, principals may be named, unnamed or undisclosed. Each is capable of acting through an agent having a prior authority. A ratification is the equivalent of a prior authority. Each should, therefor, have the right to ratify. And yet the decision in this case denies the right to an undisclosed principal. Surely the result of the decision is an anomaly in the law of agency.—*Columbia Law Review.*

THE DECISION IN THE MOLINEUX CASE—PROOF OF PREVIOUS SIMILAR CRIME.—We have not given any report of the Molineux case in this journal because the opinions are too voluminous to be printed in full, and summaries of their contents were printed in the secular newspapers immediately after they were handed down. The decision is now regularly reported in 168 New York Reports, page 264 (and in 61 N. E. 286), and we assume that the majority of the Bar have read the opinions in what is doubtless destined to be a leading case in criminal jurisprudence. The decision of the majority of the Court of Appeals upholds what we believe to have been the general sentiment of the bar, that the so-called "Barnet evidence" was subject to criticism not merely because of the technical error of admitting hearsay of an alleged declaration of Barnet, but was incompetent in its essential scope and substantial bearing. It must be conceded that the dissenting judges make a forcible and somewhat plausible plea for the general admissibility of this evidence, but, with all due respect, it strikes us more as a plea than a demonstration in form of logic.

Without intending to be invidious, we may be permitted to say that Judge O'Brien's opinion is among the group of opinions the judicial utterance *par excellence*. He seems to have performed, so to speak, a super-judicial function, to have arbitrated between an otherwise equally divided court. Speaking, as would appear, the court's last word, after weighing the arguments of his associates pro and con, Judge O'Brien reduces the actual issue to its lowest terms of succinctness, and his reasoning is a model of lucid conclusiveness. He says in part:

"The issue in this case was whether the defendant was guilty of causing the death of Mrs. Adams, and not whether he was guilty of causing the death of Barnet. In a more specific sense, the issue was whether he sent upon its errand of death, through the mail, the package from which the deceased, through mistake, took the deadly poison that killed her; or, to be still more specific, the issue was

whether the defendant wrote the direction upon the package with the felonious intent to transmit it by mail to Cornish. If the address upon the package was in fact written by the defendant, all the elements of the crime were to be deduced from maxim, '*Res ipsa loquitur.*' The events constituting the history of Barnet's sickness and death did not prove, or tend to prove, the fact that the defendant wrote the address upon the poison package that eventually came to the hands of Mrs. Adams, and that was the material issue at the trial.

"The death of Mrs. Adams resulted from poison administered by her own hand, but the real author of her death was the person who made use of the mail to transmit to some one the deadly substance that produced death. In any inquiry concerning the identity of the author of a great crime, where the evidence is purely circumstantial, the human mind instinctively adopts processes in arriving at results that are not sanctioned by the rules of evidence. The hardened and habitual criminal is more likely to be suspected than one who had never committed a crime before. If the party suspected committed a similar crime before by the same or similar means, or a series of such crimes, proof of these facts goes far to establish his guilt in the popular mind of the offense charged, and for which he is on trial; and yet nothing is better established than the rule that the vicious character of a person on trial for a specific offense cannot be shown, unless he himself makes his character or the events of his life a subject of inquiry by becoming a witness in the case. No matter how notorious a criminal the party on trial may be, neither his general reputation nor other specific offenses can legally be proven against him as evidence of his guilt of the offense charged. That such proof is persuasive, and has great influence, when introduced, upon courts and juries, cannot be doubted; but the law does not permit it to be given upon the trial of an issue concerning the guilt or innocence of the party on trial for a specific offense. The reason is that such proof does not bear upon the issue in the case, and hence it is misleading, since it does not follow that a party who has committed one crime, or many, is guilty of some other crime for which he is on trial. It is said that the evidence culminating in Barnet's death tends to identify the defendant as the author of the death of Mrs. Adams; but that is only another way of asserting the general proposition that the commission by the defendant of one crime tends to prove that he committed another crime, and, no matter in what form or how often that proposition is asserted, or how persuasive and plausible it may appear, it is erroneous and misleading, since it violates a salutary principle of the law of evidence, which should be applied in all cases without regard to the question of actual guilt or innocence. If the guilty cannot be convicted without breaking down the barriers which the law has erected for the protection of every person accused of crime, it is better that they should escape, rather than that the life or liberty of an innocent person should be imperiled. I think the evidence relating to Barnet's sickness and death would not for a moment be considered competent but for the fact that it creates a strong impression upon the mind that the author of his death must also be the author of Mrs. Adams' death, since in both cases death was caused by similar means. We may attempt to deceive ourselves with words and phrases by arguing that it is admissible to prove intent, or identity, or the absence of mistake, or something else, in order to bring the case within some exception to the general rule; but what is in the mind all the time is the thought, so difficult to suppress, that the vicious and criminal agency that caused the death of Barnet also caused the death of Mrs. Adams. The rule of law that excludes the evidence for such a purpose may be, and probably is, contrary to the tendency of the human mind; but, since the law was intended to curb the speculations of the mind and to guard the accused from the result of error, in its operation, I am for maintaining the law in all its integrity and not for undermining it by qualifications that rest upon no reasonable or logical basis."

The position of the dissenting judges, briefly, is that, conceding the existence of a general rule that evidence of another crime is not admissible, the "Barnet evidence" was nevertheless competent under an exception to such rule, which

authorizes proof of the facts and circumstances of another crime if they may be a means of identification of the person charged with the crime being tried. The argument is succinctly stated in Judge Gray's opinion:

"The rarity of the deadly drug used within a few weeks in both cases, its concealment in the same kind of powders as taken by Mrs. Adams and as found in Barnet's room after his death, and the use of the mail by the sender of the poison, in connection with the evidence showing or tending to show that defendant made use of the names of Barnet and of Cornish in the hiring and use of private letter boxes for various purposes, including the procuring of patent medicines, all of these facts would, if competently proved, have a tendency to show a urity or similarity of mental plan and operation, and bear upon defendant's identification however inconclusive in themselves."

Judge Werner answers this specific point as follows:

"Assuming Barnet to have been killed by the defendant, the crime has its own separate motive, intent and plan. This is equally true of the crime charged in the indictment. The mere fact that the two crimes are parallel as to the methods and means employed in their execution does not serve to identify the defendant as the poisoner of Mrs. Adams, unless his guilt of the latter crime may be inferred from its similarity to the former. Such an inference might be justified if it had been shown conclusively that the defendant had killed Barnet, and that no other person could have killed Mrs. Adams. But no such evidence was given. The evidence tended to show that the defendant had the knowledge, skill and material to produce the poison which was sent to Cornish. But he was not shown to be the only person possessed of this knowledge, skill and material. Indeed, it is common knowledge that there are many such persons. Therefore the naked similarity of these crimes proves nothing."

This justification of the "Barnet evidence" on the score of identification would seem to rest on something akin to *petitio principii*. Because there was direct evidence tending to identify the defendant in his alleged connection with the Barnet case, the dissenting judges assume that such identification was established, and treat it as a legitimate basis for an inference of identity in the Adams case. The very matter to be proved to be true, either in one case or the other, is assumed to be true.

We believe that the theoretical soundness and the practical propriety of the position taken by the majority of the court in this case will become only the clearer with closer analysis and the lapse of time.—*New York Law Journal.*